

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3
4 CIVIL ACTION NUMBER:

5 IN RE: VALSARTAN PRODUCTS
6 LIABILITY LITIGATION

19-md-02875

MOTIONS

VIA REMOTE ZOOM
VIDEOCONFERENCE

7 Mitchell H. Cohen Building & U.S. Courthouse
8 4th & Cooper Streets
9 Camden, New Jersey 08101
July 6, 2023
Commencing at 11:00 a.m.

10 B E F O R E:

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UNITED STATES SPECIAL MASTER

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1 (PROCEEDINGS held via remote Zoom videoconference
2 before The Honorable Thomas I. Vanaskie (Ret.), United States
3 Special Master, at 11:00 a.m.)

4 JUDGE VANASKIE: Who will be arguing on behalf of the
5 wholesalers?

6 MS. DAVIS: D'Lesli Davis for the wholesalers, Your
7 Honor.

8 JUDGE VANASKIE: Thanks.

9 Who will be arguing on behalf of the plaintiffs or the
10 TPP plaintiffs?

11 MR. STANOCH: Good morning, Your Honor. David
12 Stanoch. I will be initially arguing and then counsel for MSP
13 and MADA, who are also on, Gregory Hansel for MADA, Andrés
14 Rivero and Zalman Kass for MSP, will jump in as well.

15 JUDGE VANASKIE: All right, very well. Thank you, Mr.
16 Stanoch.

17 Will anybody else be arguing today?

18 (No response).

19 JUDGE VANASKIE: Hearing no one else, we'll proceed to
20 hear argument on this extensive motion that has been well
21 briefed.

22 Ms. Davis, are you ready to proceed?

23 MS. DAVIS: Thank you, Your Honor, yes. May it please
24 the Court.

25 I thought what I would do is take a step back and talk

1 high level about the facts of where we're at and the law, and I
2 think if we do that, number one, it will make the
3 excruciatingly painful process of going through the individual
4 requests a little bit easier, number one; and number two, I
5 think I can wind into this discussion sort of our counterpoints
6 to some of the things that the plaintiff TPPs have raised in
7 their 18-page letter response.

8 Is that all right with the Court?

9 JUDGE VANASKIE: That's all right with me.

10 I should let you all know that I have another call at
11 noon so I only have -- sometimes these can go on quite some
12 time but I will have to have a hard stop at about 11:55.

13 MS. DAVIS: I'll try to pick up the pace then,
14 Your Honor. Thanks.

15 In this case, with regard to unjust enrichment,
16 Your Honor, the TPP plaintiffs are claiming that wholesalers
17 were unjustly enriched literally thousands of times in a manner
18 that should prohibit them from keeping their profits. And what
19 they're specifically saying is that every time a TPP plaintiff
20 covered a prescription for VCD, somehow, somewhere a wholesaler
21 was tangentially enriched by that in a way that allowing them
22 to keep their profits would be inequitable and unconscionable.

23 Fundamentally, then, for this unjust enrichment theory
24 to fly, the plaintiffs have to be able to show that a specific
25 wholesaler sold a specific VCD that was covered on a particular

1 date by a specific third-party payor; and to date, the
2 wholesalers have seen zero, not a shred of evidence on that
3 front.

4 Now, what's happened over the past year is that the
5 wholesalers and the plaintiffs have been engaged in core
6 discovery or macro discovery and through that process, the
7 wholesalers have repeatedly come to the Court and said the
8 plaintiffs -- TPP plaintiffs' claims, particularly unjust
9 enrichment, but all of them, should be dismissed because there
10 is no evidence of the essential elements and they have not even
11 pled facts that would show that. And at each step in this
12 process, the plaintiffs have come to the Court and said, whoa,
13 whoa, whoa, we're in discovery, we're still trying to find all
14 this stuff out, they've begged off. They said, don't put us to
15 our proof yet, let us stay alive for another day, and on each
16 occasion the Court has allowed that to happen.

17 Even in your ruling, Your Honor, on the motion for
18 leave to amend the complaint, the plaintiffs came in and said,
19 we're going to be able to trace this stuff to the wholesalers,
20 we're going to look at these VCD numbers, and the Court, on
21 Page 12 of that ruling, Footnote 9, said that -- and I believe
22 it's Docket Number 1614 -- said, you know, the plaintiffs make
23 a persuasive case here. Discovery is ongoing, they need these
24 VCD numbers, and then they're going to be able to link this to
25 particular wholesalers.

1 So the plaintiffs were supposed to take those VCD
2 numbers and go back to their files and tell us which
3 transactions they can say or which transactions they cannot say
4 a specific wholesaler was involved in. But, of course, after
5 they survived the motion for leave to amend the complaint,
6 that's the last, you know, that we heard of that.

7 Now, where we are with this motion is wholesalers are
8 looking to close the loop. We are now at the stage where the
9 unjust enrichment claim has been certified, we are presumably
10 headed towards a trial, and so the plaintiffs, with these very
11 tailored requests that are directed only to the unjust
12 enrichment claim, are trying to find out once and for all what
13 evidence do you have that's favorable for you, what evidence do
14 you have that's favorable for the wholesalers, and what
15 evidence must you admit you simply do not have. And despite
16 having begged for more time through the entirety of this whole
17 case, in response what the plaintiffs say is, too late,
18 Wholesalers, you missed some imaginary window to find out our
19 evidence. And that just didn't make any sense.

20 Now, the wholesalers are moving forward, getting more
21 specific, going from macro to micro, trying to find the detail
22 that would support these claims that are apparently headed
23 towards trial.

24 The plaintiffs, the TPP plaintiffs, are going in the
25 other direction. We are literally being asked right now for

1 discovery that relates to not the certified unjust enrichment
2 claim but claims that are stragglers for individual class reps
3 that are now just an individual plaintiff on things that
4 survived the motion to dismiss.

5 So there can be no question that the parties are
6 engaged in discovery; there can be no question that the TPP
7 plaintiffs have the burden of proof on unjust enrichment; and
8 there can be no question that after all of these years, the
9 wholesalers are entitled to the information they request to
10 defend themselves at a trial of the case.

11 Now, real quickly, because I think we're all in
12 agreement on this, but the elements of the unjust enrichment
13 claim are set forth by Judge Kugler in Docket Number --

14 JUDGE VANASKIE: They have been fully set forth.

15 Plaintiffs, as I understand it, the TPPs have agreed
16 to produce -- respond to certain requests, have rephrased the
17 requests, you sent me the red-lined version. Why isn't that
18 sufficient?

19 MS. DAVIS: Let me tackle that.

20 So you saw the red-lined version and if you can read
21 through that, what they are saying is, we will produce the
22 documents we intend to rely on, not all documents we have that
23 relate to these things but the documents we intend to rely on,
24 and they only really talk about producing things related to
25 some claims data, contracts with the wholesalers, and documents

1 regarding wholesaler wrongdoing.

2 That is so compressed, Your Honor, as to have been a
3 nonstarter.

4 That having been said, with regard to what they put
5 into their letter brief, here is where I think we are, my
6 reading of what they said. I'm sure they will disabuse me of
7 this notion if I'm incorrect.

8 They have said they will answer Requests 1, 2, 5A
9 through P, in their entirety, as written, and will state that
10 they do not have responsive documents if they do not have them.
11 And we're okay with that as long as plaintiffs are willing to
12 explain certain data fields if we need help on those, given
13 that some of the stuff is in an Excel spreadsheet with cryptic
14 notations.

15 We, as a result of that, are willing to table Requests
16 3, 4, the remainder of 5, Q and things that we have tabled
17 before, and Request Number 6.

18 So that leaves us with Requests 7 through 28 on what
19 is really a small number of topics: Elements of unjust
20 enrichment, value of the VCDs to the TPPs, damages to the TPPs,
21 interactions between wholesalers and TPPs, and then the
22 communications leading up to the MSP assignments.

23 Now, Judge, if I may, since I -- I'm going to jump
24 over the core elements of unjust enrichment because we are all
25 on the same page, but I would note that the damages for unjust

1 enrichment can be reimbursement, restitution, disgorgement of
2 profits.

3 Now, the TPPs are not seeking restitution or
4 reimbursement and there's a reason for that: They know that
5 they're not out any money. They're not in the red on this,
6 they're in the black on this, and we think we're entitled to
7 prove it.

8 What the plaintiffs say is, oh, no, no, no. The value
9 of the product, the VCDs, to us and through our insureds, is
10 irrelevant to this proceeding because we are only pleading
11 disgorgement of profits. And disgorgement of profits is based
12 on what you, Wholesalers, got, not what we lost. And we agree
13 with that with regard to damages. But here's where the TPPs
14 are confused.

15 The unjust enrichment claim requires an assessment of
16 the equities between the parties, the context of the
17 communications and the transactions made the basis of the
18 claim, and an assessment of what the wholesalers got and
19 whether or not the TPPs were harmed. That's for liability.
20 You do not get to worry about your election of remedies for
21 disgorgement of profits or otherwise until you prove that there
22 is liability for unjust enrichment, and without some form of
23 unjustness or inequity, you're not there on liability.

24 So the vast majority of those topics that I just
25 listed, Your Honor, are requests that are directed to these

1 issues of liability.

2 And, you know, their objections, undue burdensomeness
3 and disproportionality, they filed no affidavits in support of
4 this, and as Your Honor is aware, this Court has always
5 required some sort of factual sworn testimony to support those
6 objections.

7 They complain that the requests seek sensitive and
8 proprietary information. There is a protective order that they
9 have told us from the start of this case is sufficient to
10 protect sensitive and proprietary information.

11 And, of course, they never are able to address
12 relevance because each of these requests are specifically
13 relevant.

14 And, Your Honor, with that, I'm happy to turn to the
15 actual categories of requests but I want to stop there --

16 JUDGE VANASKIE: All right. Let's turn to the actual
17 categories of requests.

18 MS. DAVIS: So Requests 11 through 16, elements of
19 unjust enrichment, so we've got, tell us if you have any
20 documents reflecting the specific benefit that the wholesalers
21 got, Number 12, and what portion of that you believe is unjust
22 for the wholesalers to retain. Fundamental unjust enrichment.
23 Fundamentally, something that's not been disclosed in this case
24 by the plaintiffs over the life of the case.

25 13, misleading actions by the wholesalers. I do

1 believe at one point the plaintiffs were willing to produce
2 that information, at least on which they intended to rely. We,
3 of course, are entitled to any of that information, whether
4 it's helpful to them and whether they want to rely on it or
5 not.

6 14, whether they expected remuneration or payment from
7 wholesalers. It's our belief, Your Honor, that there has never
8 been any interaction between the TPPs and the wholesalers,
9 there are never any contracts between the TPPs and the
10 wholesalers, and that on every one of these underlying
11 transactions the TPPs have no idea not only which wholesaler
12 was involved but whether a wholesaler was involved. And if
13 they don't have that information, we're entitled to a statement
14 of that fact in response to appropriate discovery.

15 15 is wrongdoing or unjust/improper conduct.

16 16 is any wholesaler action causing damage.

17 Those are just from the core elements of unjust
18 enrichment.

19 Now, that's Requests 11 through 16.

20 Requests 22 through 28 is -- yes, Your Honor.

21 JUDGE VANASKIE: It may be helpful for me, Ms. Davis,
22 if I ask Mr. Stanoch to respond at this time with respect to
23 those particular requests.

24 MR. STANOCH: Yes, Your Honor, David Stanoch for the
25 plaintiffs, and my colleagues for MSP and MADA can feel free to

1 jump in.

2 I'm loathed to do it but just to note two things I
3 heard very early on: This is not a referendum or
4 reconsideration of Judge Kugler's motion to dismiss rulings.
5 This is not a referendum and reconsideration of Your Honor's
6 ruling and Judge Kugler's affirmance of your ruling on the
7 motions for leave to amend the complaints. This is not a
8 referendum or reconsideration on the class certification
9 decision, the very long and detailed and yearlong-briefed
10 motion and order that Judge Kugler entered. So the talk about
11 what plaintiffs will prove and how they will do it and the
12 veracity of their claims, we've been through this multiple
13 times for years and we have substantive rulings at every step
14 of the way on the veracity of our claims.

15 Number two, I keep hearing reference that the TPPs, in
16 their files, may not, may not have reference to specific
17 transactions with wholesalers touching a specific pill. We
18 have been through this before as well, Your Honor, that we can
19 establish elements through defendants' own files, which we have
20 been working on, as Your Honor knows from prior years of
21 discovery of wholesalers, regarding which defendants touched
22 which product. There's no requirement in the law that I, as a
23 plaintiff, must have my own record to prove an element of my
24 claim exclusively.

25 On Requests Number 11 to 16, specifically, Your Honor,

1 we're not even sure what else would be produced. I'm not even
2 sure -- first of all, we stand on all of our arguments in our
3 letter, of course, Your Honor, in terms of the --

4 JUDGE VANASKIE: Of course you do.

5 MR. STANOCH: -- timing, et cetera. I will not
6 belabor all that.

7 In terms of what they are, they're talking about the
8 value and the benefit you allege wholesalers received and the
9 wrongdoing, all of that has been produced, Your Honor. We
10 produced in response to Request Number 7 that all of these
11 defendants, three years ago almost, including wholesalers, all
12 documents not previously produced that reflect, relate, or
13 refer to any amount for which you seek reimbursement on,
14 including the amounts sought, the amounts of alleged diminution
15 in value of the VCDs as warranted, and as received and/or
16 covered by you or each assignor or its agent and/or any alleged
17 loss of benefit of any alleged bargain you claim herein
18 specified by specific VCD product. Right? This was something
19 negotiated a long time ago. We've produced damages reports,
20 Judge. We're not starting from the beginning in this case.

21 JUDGE VANASKIE: Right.

22 MR. STANOCH: They have our expert report which
23 specifies the benefit alleged that the wholesalers received.
24 Their profits, we've been talking about that for a very long
25 time, the specific benefits and what was unjust, the profits on

1 the VCDs at issue that were merchantened in this case, and Judge
2 Kugler affirmed our damages expert's damages methodology as
3 sufficiently reliable to go forward.

4 So in terms of all this information, aside from all of
5 our other objections to it, they have everything that we would
6 use to show benefit and our damages report; and if there's
7 additional information that they have yet to produce to us
8 under CMO 32, of course we can cite that back to them if we
9 ever get to the point where we need to supplement our expert
10 report. But as of now, they have all of this and I am not sure
11 what, if anything, else there would be.

12 JUDGE VANASKIE: Mr. Stanoch, where do things stand
13 with respect to the compliance with CMO 32?

14 MR. STANOCH: In terms of CMO 32, and to remind
15 Your Honor, CMO 32 spoke exclusively of ordering downstream
16 defendants, retailers, and wholesalers to produce information.

17 JUDGE VANASKIE: Right.

18 MR. STANOCH: Nothing talked about plaintiffs to
19 produce anything additionally because they never asked at that
20 point because they had all these opportunities years ago.

21 With the wholesalers specifically, they have produced
22 data responsive to one of the subcategories ordered by CMO 32.
23 They are -- that's the amounts paid and the amounts charged for
24 VCDs, I believe.

25 JUDGE VANASKIE: Go ahead.

1 MR. STANOCH: They are still working on their own on
2 the profits issue. We had a call I believe before the July 4th
3 holiday.

4 And then custodial discovery, we're still trying to
5 meet and confer with them on that but that's really gone
6 nowhere at this point and we are much more progressed with the
7 retailers, for example, where, Your Honor, we presented a joint
8 schedule on RFPs, search terms, deadlines for custodians,
9 30(b)(6)'s. We're nowhere close to that with the wholesalers.

10 JUDGE VANASKIE: All right, thank you.

11 Anything else on Requests 11 through 16?

12 MR. STANOCH: I don't think so. Unless one of my
13 colleagues has something else to add, Your Honor, I think
14 Your Honor appreciates the issues.

15 MS. DAVIS: Your Honor, if I may, I think what they're
16 saying is that they don't have any responsive documents to 11
17 through 16 in their own files, that they're going to do some
18 work with the documents produced by the other defendants, but,
19 Your Honor, I would suggest we're entitled to that statement in
20 response to formal discovery. If they don't have it, they need
21 to say it; and the reason they don't want to say it is because
22 they realize how devastating it is to their claim. But this
23 dodge about pointing everywhere else and playing with times and
24 the shell game of timing is inappropriate. These are core
25 fundamental requests and why they can't say that they don't

1 have any documents that show that there was a specific benefit
2 generated by them to the wholesalers is beyond me.

3 MR. STANOCH: That's not what -- I'm sorry. May I
4 respond?

5 JUDGE VANASKIE: You may respond, Mr. Stanoch.

6 MR. STANOCH: Ms. Davis's statements are very, I
7 believe, not tethered to the requests we're really focused at
8 issue. This is not asking for things in our files or it's not
9 asking for documents that the wholesalers have. They're not
10 reflected in the actual wording of 11 through 16. Plus,
11 there's no shell game on the timing. The chronology speaks for
12 itself. And this idea that if we don't have documents we are
13 not saying something, we have agreement I heard on all of the
14 burdensome data requests which we've agreed to, notwithstanding
15 our objections, where we've said we will respond and produce
16 data or state that there's no additional data for the various
17 subparts.

18 So we're not trying to hide anything. We've said
19 exactly what she's asking for, for the requests which we think
20 are appropriate at this period.

21 JUDGE VANASKIE: Thank you.

22 MS. DAVIS: Your Honor, I'm ready to move on to
23 Requests 22 through 28 if it's --

24 JUDGE VANASKIE: Let's do so.

25 MS. DAVIS: These are the requests that relate to the

1 value of the VCDs to the TPPs or their insureds. A lot of
2 acronyms there. I apologize.

3 22 is the value provided to the insureds by the VCD,
4 23 is the value provided to you, the TPP, and they go through a
5 number of documents culminating in Number 28, which is
6 essentially the profits to the TPPs.

7 Now, as we discussed, in trying to determine whether
8 it is unjust for McKesson to retain, as an example, and a
9 wholesaler, whatever payment it tangentially received through
10 its supply chain provision of a particular VCD, say, to a
11 pharmacy, it is appropriate to look at the juxtaposition and
12 the situation and the equities between the parties. And the
13 plaintiffs keep talking about this idea that the VCDs were
14 worthless to them. They invoke Judge Kugler's warranty motion
15 to dismiss order, which talks about worthlessness, and they
16 pretend to say that Judge Kugler somehow has ruled on the
17 merits, as a matter of law, that there's liability for the
18 wholesalers, and that's not what happens in a motion to
19 dismiss, clearly; but also he was talking about contractual
20 claims, benefits of the bargain, meeting of the minds. We are
21 in the equitable world. And so if we were to find that the
22 plaintiffs got the product and actually made money off each of
23 these transactions, that would be very relevant to the equities
24 between the parties and whether McKesson was running away with
25 some ill-gotten gain.

1 And I would also point out that each of these relate
2 to the unclean hands defense as well. And the unclean hands
3 defense here, Your Honor, is that the TPPs are saying that the
4 wholesalers, without any knowledge, came into possession of
5 VCDs that were tainted, turned around and sold them without
6 knowledge, and somehow profited off that. Well -- and then
7 they say they didn't do that, they didn't profit off a sale of
8 a VCD, but they profited off their purchases of VCDs. As they
9 made those purchases, they fulfilled their contractual
10 insurance arrangements, they were collecting co-pays, they were
11 having insureds be satisfied because they were getting their
12 prescriptions covered, and we believe there's actually a
13 specific cost associated with a lot of these transactions by
14 the health insurance company TPPs on which they were literally
15 profiting from the processing and the passing of the VCDs on
16 further through the system.

17 So each of these value issues relate to whether the
18 plaintiffs come into court with unclean hands. And, of course,
19 that's the haggling --

20 JUDGE VANASKIE: How would you value an insured's
21 satisfaction?

22 MS. DAVIS: Well, I think we have to get experts to do
23 that once we see what their own presentations say at the end of
24 the year. Hey, we've had a great year, we fulfilled all of
25 this, this is what we made on individual transactions, this is

1 how many repeat signups we have, this is how much we've been
2 able to increase the premiums for a good service the year
3 before. I mean, I think it's all within the business records
4 of those companies how they valued their ability to fulfill
5 these services, what value they placed on meeting their
6 contractual obligations; and then, of course, Judge, you just
7 can't skip over it, right, the therapeutic value to the
8 insured.

9 So the insured is taking a blood pressure medication
10 and they make it through the year without a heart attack or a
11 stroke, how do you value that? I think we would have to have
12 expert testimony. But what do the medical records in the TPPs'
13 own files say about that? Are they collecting that, yes, we
14 see that Valsartan has been a good drug for this patient; we
15 will continue to keep it on this formulary; we will continue to
16 approve that prescription. We'll cover it. It's good.

17 All of those things are value, all those things relate
18 to the equities between the parties and the unclean hands.
19 Right? So it's liability as well as the affirmative defense.

20 And in a gutsy move, right, the plaintiffs' response
21 to this is, oh, this discovery is not -- on unclean hands is
22 not too late, it's premature. So, you know, I thought we were
23 headed to trial, I thought we were trying to get the core
24 documents. I thought the plaintiffs needed to be held to
25 answer whether they do or do not have relevant evidence,

1 whether it helps them or hurts them, not what they intend to
2 rely on but what they have in their files, and very clearly
3 these requests relate to what these TPPs have in their files.

4 So, with that, we believe that on both liability and
5 unclean hands affirmative defense, each of 22 through 28 are
6 required for production or for a statement we don't have it.

7 JUDGE VANASKIE: All right. Do you want to reply, Mr.
8 Stanoch?

9 MR. STANOCH: I will, Your Honor. And it's
10 breathtaking to hear argument again at this stage, years into
11 the case, about value and therapeutic value of the VCDs. We
12 put in our letter, and, again, I won't belabor this either,
13 Judge, this has been discussed and argued between three
14 different jurists, yourself, Judge Kugler, Magistrate Judge
15 Schneider, ad nauseam for years, we've crossed this bridge, it
16 was a flashpoint of discovery for years. On class
17 certification, Judge Kugler rightly said that the therapeutic
18 value does not -- is not disabling to our damages expert's
19 report. And just like in the *BCBS v. GlaxoSmithKline* case,
20 where Dr. Conti was an expert there, any value and failure
21 allegedly to discount for therapeutic value of a drug is a
22 credibility determination to be made.

23 In terms of the profits that the TPP plaintiffs made,
24 as a matter of law, Your Honor, unjust enrichment, it focused
25 on defendants' gains, not plaintiffs' conduct and losses. I

1 don't think we need to argue that any more. I think the case
2 law is very clear.

3 These entities, too, MSP's assignors and MADA, they're
4 not in the supply chain. They keep saying, oh, you're equally
5 culpable, maybe you did something too, even if unclean hands,
6 which we've never had an answer in this case so, of course,
7 it's that we haven't been able to deal with this and test an
8 unclean hands defense legally because they haven't been ordered
9 to file an answer, they don't touch the product. They're a
10 different type of entity. They are not taking it and then
11 selling it at a markup to a consumer themselves in which case
12 maybe, oh, well, you know, you did the same thing as
13 wholesalers, you made a profit too, that should be part of the
14 damages calculation and offset somehow equitably. That's not
15 the case here; that's not the reality.

16 MSP's assignors and MADA are just passive entities
17 who, at the point of sale, are contributing reimbursement money
18 to the drug. They're never merchanting in the product, they're
19 not profiting on the product, even if that was relevant.

20 A number of these documents, too, Your Honor --
21 obviously, all of the objections that are in our letter we
22 stand on. A number of these documents Ms. Davis talks about,
23 oh, things they considered or value or things of that nature,
24 these requests talk about things that were already produced.
25 Formularies, Pharmaceutical and Therapeutic Committee meeting

1 minutes. Those are the meetings, right, of the subgroups
2 deciding which drugs will be covered and if they're covered,
3 does it have a value or not, and the tier placement, all of
4 that's there. All of the data, all of the data on all of the
5 transactions that these claims and all of the reimbursement
6 data that Your Honor has dealt with over the last eight months,
7 MSP has now produced supplementally, they have all that.

8 So I don't believe, given the nature of the claim and
9 the reason, which is unjust enrichment, right, which focuses on
10 the defendants, and the long history of discovery in this case,
11 that there's anything else that MSP and MADA, at this juncture,
12 nearly four, five years in the case, should have to respond to.
13 Even if they don't have it, right, I think that itself is
14 disproportional and unduly burdensome.

15 And I'll note that all of the discovery of the
16 wholesalers to this point, right, was non-custodial and very
17 narrowly focused, and Magistrate Judge Schneider wanted us to
18 do that, he emailed us in 2019 to do that. The requests we had
19 to enter as to wholesalers specifically say it's non-custodial.

20 So for them to turn around now and say, oh, we need
21 everything from their custodians about value and medical
22 records and things of that nature, we think it's completely
23 disproportionate and unduly burdensome and completely
24 untethered to the actual claim, unjust enrichment, that they
25 say they need it for, which they knew about for the last four

1 years.

2 MS. HANSEL: May it please the Court, Your Honor, Greg
3 Hansel for MADA.

4 MADA, by statute, is a nonprofit multi-employer
5 welfare arrangement under Maine statute. We do not make a
6 profit. Even if we did, the measure of damages in an unjust
7 enrichment claim is the benefit retained by the defendant, not
8 the plaintiff's loss or profit. So it's irrelevant.

9 I'm baffled by some of Ms. Davis's arguments. She
10 argued that the wholesalers have a tangential role. Their role
11 is not tangential. They are directly a crucial part of the
12 supply chain between manufacturers and pharmacies.

13 She also said, if, if wholesalers somehow profited,
14 well, I thought their business model was to buy drugs from
15 manufacturers, mark them up and resell them to pharmacies. So
16 if they weren't making a profit, maybe they wouldn't be, you
17 know, some of the largest businesses in this country and most
18 profitable.

19 The wholesalers also do not explain why it matters
20 that this is an unjust enrichment claim where Judge Kugler
21 ruled on the motion to dismiss that the drugs were worthless.
22 Why is unjust enrichment damages different where the Court has
23 stated the drugs were worthless in the context of warranty? So
24 it's a distinction without a difference.

25 Your Honor, we believe the requests should be denied.

1 Thank you.

2 JUDGE VANASKIE: Thank you, Mr. Hansel.

3 MS. DAVIS: Your Honor, that's just not the law. They
4 keep talking about damages and the choice of their damages, but
5 the justness issue is relevant. And I won't read it to you but
6 I would point you to two cases cited by the plaintiffs in their
7 letter, *Cohan v. Minicozzi*, that is 2016 WL 5798900, Superior
8 Court of Connecticut. The Court says, the defendant was
9 benefited by plaintiff's work, he failed to pay for that work,
10 and plaintiff has been financially harmed as a result. They
11 are looking at whether the plaintiff has been harmed.

12 The other case is *Swan Media Group v. Staub*. In New
13 York, to prevail on a claim of unjust enrichment -- this is the
14 liability piece, not damages -- the plaintiff must establish
15 the defendant benefited at the plaintiff's expense and then the
16 equity and good conscience. Where is the good conscience
17 coming from? It's coming from a look at the totality of the
18 circumstances. Equity and good conscience then require a
19 remedy for that.

20 So the plaintiffs' own mandates in their cited law
21 says that when you're looking at the liability here, we have to
22 factor in the justness.

23 I do want to mention tangential. The reason
24 tangential is important is wholesalers are completely
25 tangential when it comes to TPPs. They are over here on a

1 supply chain, manufacturer to wholesaler to pharmacy. There is
2 a complex insurance system that almost nobody can figure out
3 between the TPPs, their administrators, how they cover a claim,
4 what they pay, when. Never the twain shall meet, Your Honor.
5 And it is that fact that plays, again, into the justness, the
6 directness of the relationship, and other elements of
7 liability.

8 And the last thing I would say on this point, because
9 Mr. Stanoch says it about a lot of things, he said they have
10 all that, that all is out there, that. What is where,
11 Your Honor? We ask specific requests and if that has been
12 produced, great, cite it to us. If you don't have it, great,
13 we will move on. But this is a search for relevant element
14 evidence that the plaintiffs have been saying for years they
15 will get to and they haven't, and as we head in the
16 homestretch, the wholesalers are entitled to it.

17 Your Honor, I think the next two categories, damages
18 to the TPPs, communications and contracts with the wholesaler
19 defendants, are very fundamental types of requests for
20 production. I am going to jump over those for that reason and
21 go to the last category.

22 JUDGE VANASKIE: All right.

23 MS. DAVIS: Request Number 10 is communications
24 culminating in the assignment. So this is directed to MSP and
25 its assignors. This is not Mr. Hansel who's MADA over there.

1 These are the assignments made by the various TPPs to MSP,
2 which has repeatedly been called a debt collector, a litigation
3 vehicle in the reported opinions about MSP. And if MSP is
4 going to be a class rep, if this litigation vehicle is, as it
5 is now a confirmed class reps, then defendants are entitled to
6 understand how those assignments work, how they were
7 negotiated, what the intention of those assignments was, and
8 what the scope of those assignments as informed by these other
9 documents is.

10 And we've cited two cases, *MAO-MSO v. Mercury*, that's
11 2023 WL 1793469 at 2 from the Ninth Circuit; and then *MAO-MSO*
12 *Recovery v. Farmers Insurance*, 2022 WL 1690150 at 7 through 9.
13 And what the Ninth Circuit says is, look, we started looking
14 into all this information in the assignments and when you look
15 at extrinsic documents, hey, we found that the particular
16 assignors in issue had already assigned these claims to another
17 entity; therefore, this assignment is invalid.

18 The *Farmers* case, similar. The discovery after
19 looking at these negotiations and the documents related to the
20 assignment list, MSP didn't own the claims at all.

21 So this is a test. There's a request to get the
22 documents that would test the scope, the validity, the limits,
23 and the nature of the claims that were intended to be included
24 in the assignments. We do have the assignments. There is a
25 need to go beyond that particularly, as these courts have

1 found, but we're talking about a really quirky, ginned-up
2 vehicle to try to pursue claims on behalf of other entities
3 that are not technically before the Court.

4 JUDGE VANASKIE: But why would not the assignments
5 themselves answer the question?

6 MS. DAVIS: Just as in those two cases, if we look at
7 the relevant documents and we see that, oh, this assignor had
8 already assigned these claims or the underlying document here
9 says we will not assign you these claims, despite the existence
10 of this assignment, we may find that MSP, as in these other
11 cases, do not have the claims that they purport to have in the
12 assignments they produced in the litigation. It is testing the
13 validity of those assignments and there is certainly enough
14 question about this litigation vehicle, how they do business,
15 and what the negotiations are that that testing seems warranted
16 and we shouldn't have to take MSP's word at the face of the
17 assignment that all is good and clean here, particularly in
18 light of past findings that that's not been the case.

19 JUDGE VANASKIE: All right. Who will be responding on
20 that?

21 MR. RIVERO: Judge, I would like to --

22 JUDGE VANASKIE: Mr. Rivero?

23 MR. RIVERO: Yes, Your Honor, Andrés Rivero, but just
24 briefly, and Mr. Kass will go into the details.

25 Judge, I just want to note, this case is many years

1 old. I was involved in the negotiation of the plaintiffs fact
2 sheets at the very beginning of the case where one of the
3 central issues was the production of these assignment
4 contracts. They were produced years and years ago, discovery's
5 been ongoing for years, and this is very, very late in the game
6 -- by the way, Ms. Davis's characterization of the case is
7 that's about the ultimate claim, not about the assignments.
8 This is way, way late in the game when they've had knowledge
9 about these assignment agreements, have had the assignment
10 agreements, Judge, I don't want to exaggerate, but I'm
11 remembering four or five years.

12 So I'll defer to Mr. Kass on the details.

13 MR. KASS: Your Honor, just to build off of that, this
14 entire hearing, you know, Ms. Davis started off saying we need
15 information about the unjust enrichment claims. What these
16 arguments are simply saying are -- they are attacking the
17 validity of the assignments. It has nothing to do with the
18 unjust enrichment. We haven't heard any explanation why this
19 hasn't come up in the past four years.

20 Your Honor, what hasn't been mentioned is that
21 defendants had the opportunity and, in fact, did depose MSP's
22 corporate representatives who signed and who negotiated these
23 assignment agreements. They have deposed the assignors.
24 Your Honor, if they had any questions about the scope of the
25 assignments that cannot be answered from the face of the

1 assignment, which would be quite surprising, Your Honor,
2 because the assignments say exactly what is being transferred
3 over, if they had any additional questions, they had
4 opportunities at a deposition to ask the assignors. So it's
5 unclear now what they want.

6 Your Honor, if you read what they're asking for in the
7 actual requests, okay, is, okay, so for each claim that you
8 obtain through an assignment, any and all communications
9 between you and that party making the assignment reflecting the
10 negotiation of that assignment.

11 Your Honor, that is extremely broad, asking for any
12 email, any detail, and they haven't even said specifically what
13 they're looking for other than maybe we'll find something that
14 maybe will show that maybe you don't have these claims.
15 Your Honor, that's a purist fishing expedition. They haven't
16 shown any valid basis for it here; they haven't explained why
17 they haven't asked for it before.

18 Your Honor, at this point in time our position is it's
19 too late, it's unduly burdensome, and, Your Honor, frankly,
20 there's no real need for it.

21 So unless Mr. Andrés or anybody else has anything else
22 to add.

23 MR. STANOCH: I hate, Your Honor, to triple-team Ms.
24 Davis but I know she can handle all three of us.

25 Just procedurally, as Mr. Rivero noted, there was

1 extensive negotiation for the fact sheet, the TPP fact sheet,
2 that MSP had to respond and the assignments were a very hot
3 issue there.

4 There was another set of RFPs which wholesalers
5 signed, right, years ago, any agreements or contracts which
6 reflect, refer and/or relate to any agreement between you and
7 an assignor, and it goes on.

8 So the idea that maybe there's some other side
9 agreement that Ms. Davis is implying may exist, it would have
10 already been produced, if any, right, under these requests,
11 separate from the fact sheets as well. And then as Mr. Kass
12 mentioned, both MSP and the assignors were all deposed, they
13 were all asked about it, nothing else came up there. And then
14 I'd be remiss if I did not add that Judge Kugler already found
15 that MSP is an adequate class representative on behalf of the
16 assignors at issue in this case, and it would be an attack and
17 a reconsideration of that order and ruling to start coming in
18 now to say they lack standing or the assignments are not valid
19 or they're inadequate when that issue was directly bearing on
20 the adequacy as a representative and it was found to be met by
21 the Court.

22 JUDGE VANASKIE: Thank you.

23 Ms. Davis.

24 MS. DAVIS: Yes, I think I can wrap up. I know we are
25 at three-quarters after the hour and you've got a hard stop.

1 At core, these requests for production are directed at
2 searching out relevant evidence for the one claim that the TPPs
3 have moved for class cert on and that it is anticipated that
4 there could be a trial on it. Aware then that there's a trial,
5 that has crystallized the need for the marshalling of the
6 evidence that exists on these claims and that has not been
7 clearly delineated by the TPPs to date, despite their repeated
8 promises to the Court that we're going to get there, we're
9 going to link these things to wholesalers, we're going to show
10 how wholesalers fit in all this, we're going to show you
11 traceability, we're going to show you that there was an unjust
12 portion of what the wholesalers got, we'll let you know what
13 that is. It's never happened and we're on a track here.

14 We are narrowing issues and, in all candor,
15 Your Honor, it would be nearly impossible for the wholesalers
16 to have a full and fair defense presented to the jury without
17 this information. Judge Kugler has said he would never send a
18 party to trial without the basic discovery that they need, and
19 as this case has proceeded from macro discovery to class
20 certification issues to decisions about what can be in the
21 pleadings, always was a later date to talk about specific
22 claims and specific evidence related to those claims once we're
23 in the trial.

24 It's appropriate for the wholesalers to get to serve
25 these here. And I think what we've heard, Judge, honestly, is

1 that most of this stuff does not exist in the TPPs' files. And
2 so any burden argument is unlikely.

3 I do not believe that the parties have -- I do not
4 believe that the TPP parties have this information and it's
5 fair to require them to say so.

6 Thank you, Your Honor.

7 JUDGE VANASKIE: All right. Anything else?

8 MR. STANOCH: Your Honor, David Stanoch.

9 There's many things I would say in response to that.
10 I will just leave it that we all disagree with the
11 characterization, and issues about unjust enrichment damages
12 and a potential trial has absolutely nothing to do with
13 wholesalers belated attempt to get all documents about these
14 assignments at issue.

15 And she references, which I think is an inappropriate
16 reference, to Judge Kugler's statement. That was about
17 supplemental expert reports that focused on the first subclass
18 trial against ZHP, Teva, and Torrent. It had nothing to do
19 with new fact discovery.

20 Also, she says she has a right to get the discovery.
21 She did. She had years. Our chronology speaks for itself.
22 All the defendants were there every step of the way. This very
23 issue of assignments and everything else in their letter, this
24 was all part of what they wanted, no one was denied anything.
25 That's different than the plaintiffs who tried to get things

1 specifically and were told deferred and wait. That's what CMO
2 32 ordered us to get. That's why CMO 32 didn't order TPPs to
3 produce anything else. The wholesalers had their shot
4 repeatedly.

5 MS. DAVIS: I would just note for the record,
6 Your Honor, the wholesalers, before the entry of CMO 32,
7 briefed that they wanted discovery. While all this discussion
8 was going on about discovery, the TPPs raised and requested
9 discovery -- I'm sorry, the wholesalers raised and requested
10 discovery from the TPPs. It simply was omitted. Nobody talked
11 about it in the order. I don't think it was even an
12 intentional denial. I think it was a complete oversight.

13 So pretending that just because CMO 32 doesn't have
14 discovery directed at the TPPs is not a fair representation.

15 MR. STANOCH: The chronology speaks for itself, Judge.

16 JUDGE VANASKIE: Thank you, Mr. Stanoch.

17 Mr. Hansel, Mr. Rivero, Mr. Kass, anything else?

18 MR. RIVERO: Nothing further from MSP, Your Honor.

19 MS. HANSEL: Nothing further from MADA. Thank you,
20 Your Honor.

21 JUDGE VANASKIE: All right. I'm sorry we had a hard
22 stop but I think we are getting close enough to it now that we
23 will adjourn for the day.

24 You've given me a lot to chew on here and I will try
25 to get a decision out as soon as I can. Unfortunately, I will

1 be in Pittsburgh next week so I don't think you will get
2 anything from me before the end of next week on this issue. So
3 I beg for your indulgence and patience, and I will get
4 something out promptly, as prompt as I can.

5 Anything else?

6 MS. DAVIS: Thank you.

7 MR. STANOCH: Your Honor, I just think in Ms. Davis's
8 rendition of the different requests, I think she might have
9 overlooked the one about contracts with wholesalers, or did we
10 reach agreement then today, Ms. Davis?

11 MS. DAVIS: No. I think I skipped over them because I
12 thought they were sort of self-explanatory and well-briefed by
13 both sides. If you want to slug it out, we can, but I was
14 trying to pick up the pace and not talk about things we
15 considered fundamental and that I think the parties have joined
16 issue on.

17 MR. STANOCH: One thing.

18 JUDGE VANASKIE: Mr. Stanoch, yes.

19 MR. STANOCH: Very briefly, Your Honor.

20 These requests about any contracts with wholesalers
21 and documents relating to same, the fact is, again, all of our
22 objections are in the letter, this isn't give us any contract
23 you, MADA or MSP assignors, have with a wholesaler defendant
24 relating to VCDs. It's give us any contract or agreement you
25 may have with a wholesaler for any reason; and on top of that,

1 give us any documents relating to or discussing or concerning
2 any such agreements. Right? And our proposal was very
3 rational, based on all the court-ordered discovery in other
4 instances earlier where if there is any agreements or contracts
5 with wholesalers and the at-issue entities regarding VCDs, they
6 be produced or would say none exist. Everything else
7 collateral that's something that's not about VCDs and doesn't
8 touch on it or documents about those VCD agreements, if any,
9 well beyond the scope of what wholesalers have had to do or
10 retailers or any other party. So we just wanted to underscore
11 that.

12 MS. DAVIS: Your Honor, briefly on that.

13 I mean, we seek contracts or agreements between the
14 wholesalers and the TPP class reps. That is so fundamental as
15 to be, you know, elementary. Then we seek any communications
16 between the two regarding the actual claims in the case or
17 regarding the VCDs at issue in the case. And they say, oh,
18 we'll give you some contracts; we're not going to talk to you
19 about these communications with regard to the claims or the
20 VCDs.

21 So that's another nonstarter, Your Honor. I mean, the
22 communications between the parties with regard to the specifics
23 of the case, fundamentally relevant, fundamentally have not
24 seen in this case, have not been produced in this case by the
25 TPPs.

1 MR. STANOCH: Neither have the defendants.

2 MS. DAVIS: There are none. We don't have any.

3 JUDGE VANASKIE: All right. I think that will be it
4 for today, then. I will issue a decision.

5 Camille, thanks for your patience and we will look
6 forward to getting the transcript from you and we will move
7 forward.

8 Thank you all very much.

9 MR. STANOCH: Thank you, Judge.

10 MS. DAVIS: Thank you, Your Honor.

11 (The proceedings concluded at 11:53 a.m.)

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13 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.

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19 /S/ Camille Pedano, CCR, RMR, CRR, CRC, RPR July 8, 2023
20 Court Reporter/Transcriber Date

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